SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 554.

THE WESTERN UNION TELEGRAPH COMPANY,
APPELLANT,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF OF COUNSEL FOR THE POSTAL TELEGRAPH CABLE COMPANY AS AMICUS CURIÆ.

Leave of court having been first obtained, we respectfully urge that the motion made herein to advance this cause for hearing be denied, or that decision thereon be postponed until the case of the Chicago Great Western Railroad Company, plaintiff, *vs.* The Postal Telegraph Cable Company, defend-

ant, now pending in the United States Circuit Court of Appeals for the Seventh Circuit, is before this Court, in order that the two cases may be heard together; and in support thereof submit the following:

Both cases call in question the validity of the same ruling of the Interstate Commerce Commission. In the case of the Chicago Great Western Railroad Company *vs.* Postal Telegraph Cable Company, *supra*, the plaintiff by its bill sought a mandatory injunction to compel the performance by the defendant of a certain contract entered into between the defendant and the Chicago, St. Paul and Kansas City Railway Company, of which plaintiff is successor, and also to restrain the prosecution of certain actions at law for the recovery of compensation for telegraphic service rendered to the plaintiff. The case was tried before Judge Evans in the District Court of the United States, Northern District of Illinois, Eastern Division, and decided in favor of the defendant. Whereupon an appeal was taken to the Circuit Court of Appeals, and has been specially set for hearing February 6, 1918.

It is believed that the record in the case at bar does not present all the facts necessary for proper consideration of the questions involved, for the reason that there is no real contest between the plaintiff and the defendant. It is evident that both parties desire that the Interstate Commerce Commission's ruling be held invalid. No testimony whatsoever was taken. The record consists merely of the bill of complaint and answer. The answer admits the allegations of the bill of complaint, and we believe it can be made apparent that the bill of complaint does not fully and fairly present the case. The Interstate Commerce Commission was not called in until after the record was made up. The Court of Appeals opens its opinion in that case by saying:

> "The real contest in this case is between the plaintiff and defendant on the one side and the Interstate Commerce Commission on the other."

There is a real contest in the case of the Chicago Great Western Railroad Company *vs.* The Postal Telegraph Cable Company. The defendant in that case is vitally interested in having the ruling of the Interstate Commerce Commission sustained. The case was closely contested and brings out all of the points in favor of the Commission's ruling, and is complete in its evidence and testimony. It is significant in this connection that in the Postal case the decision was in favor of, while in the Western Union case it was against, the validity of the Interstate Commerce Commission's ruling.

The attorneys for the Chicago Great Western Railroad Company recently filed a motion in the Circuit Court of Appeals and strongly urged that court to postpone the hearing of the case until after the decision by this court in the case at bar. The motion was overruled upon the objection of the Postal Telegraph Cable Company and set for hearing, as above stated, on February 6. In this connection it is interesting to note also that when the Postal Telegraph Cable Company sued the Chicago Great Western in New York for telegraph tolls, the attorneys for the Baltimore & Ohio Railroad Company appeared for the Chicago & Great Western. These facts indicate the possibility that the attempt at delay in Chicago is prompted by a desire to have the question decided by this court solely on the more incomplete record in the case at bar.

The Postal Telegraph Cable Company has taken great pains and gone to great expense to fully present its case, and is vitally interested in the outcome, and sincerely prays that this court will give it an opportunity to present to it the result of these efforts before it finally passes on the validity of the Commission's ruling. It is believed that this will involve a delay of probably only three or four weeks. Just as soon as the record in the Postal Telegraph Company case is before this court, we will gladly join in a request for an early hear-

ing, and believe that such request will then be concurred in by the counsel for the Interstate Commerce Commission.

Respectfully submitted,

W. W. COOK,
BYNUM E. HINTON,
Counsel for Postal Telegraph Cable Company.

(36404)